IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 5, 2008 Session

GLORIA WINDSOR v. DEKALB COUNTY BOARD OF EDUCATION

Appeal from the Chancery Court for DeKalb County
No. 2005-082 Ronald Thurman, Chancellor

No. M2007-00968-COA-R3-CV - Filed March 25, 2008

In this action against the DeKalb County Board of Education and the Director of Schools, the plaintiff seeks judicial review of her termination in 2001 as a tenured teacher, reinstatement to her former position, and back pay pursuant to the Tennessee Teacher Tenure Act, Tenn. Code Ann. §§ 49-5-501 to -515. The trial court summarily dismissed the petition, finding it untimely. We affirm the summary dismissal of the petition as being untimely.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J., joined.

Robert L. Huskey and Jason L. Huskey, Manchester, Tennessee, for the appellant, Gloria Windsor.

Michael P. Mills and Michael B. Schwegler, Nashville, Tennessee, for the appellee, DeKalb County Board of Education.

OPINION

The present dispute between the plaintiff, Gloria Windsor, and the DeKalb County Board of Education has followed a nomadic journey through five courts over a period of seven years, and this is the second time this court has been favored with an appeal of the parties' dispute. The matters at issue arise from the November 2001 decision by the DeKalb County Board of Education to terminate the employment of Gloria Windsor. Ms. Windsor, who had served as a teacher for the school system since 1982, was a tenured teacher when she received a letter from the principal of her school on September 6, 2001, providing notice that she was charged with five offenses upon which her tenured employment could be terminated. The charges were for incompetence, inefficiency, insubordination, unprofessional conduct, and neglect of duty. The letter identified eight allegations to support the statutory charges.

Most of the relevant facts of this case are set forth in detail in *Windsor v. DeKalb County Bd. of Educ.*, No. M2002-00954-COA-R3-CV, 2004 WL 875263 (Tenn. Ct. App. April 22, 2004) (hereinafter "*Windsor I*"), the first appeal of the parties' dispute to this court. In the excellent

opinion authored by Judge William B. Cain, the court noted that the first appeal arose after Ms. Windsor had voluntarily dismissed her previous Petition for Judicial Review, which had been timely and properly filed pursuant to Tenn. Code Ann. § 49-5-513. The relevant facts, as set out in our 2004 opinion, are as follows:

> Appellant Gloria Windsor was a tenured special education teacher with DeKalb County High School. On September 11, 2001, at its monthly meeting, the DeKalb County School Board certified charges against Appellant alleging incompetence, inefficiency, insubordination and unprofessional conduct. On November 19, 2001, after a five-day hearing, the DeKalb County School Board dismissed Ms. Windsor. The record on appeal reveals that a transcript of that November 19 hearing was prepared and that Appellant Windsor was represented by counsel at the proceeding. The record also contains a newspaper article relating the result of the hearing. No transcript of that hearing appears in the otherwise voluminous record on appeal.
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> Before proceeding to the consideration of Appellant's issue on appeal we must relate the convoluted procedural history of the actions involving Gloria Windsor and the DeKalb County School Board. The record before us reveals that, pursuant to the Tennessee Teacher Tenure Act, Appellant filed a petition in Chancery Court for DeKalb County seeking judicial review. Her petition was filed on December 21, 2001. On January 12, 2002, Petitioner also filed a Petition for Common-Law Writ of Certiorari in the circuit court seeking review of the same DeKalb County School Board action. Counsel for DeKalb County defended vigorously against both petitions. This defense included arguing for dismissal of Appellant's petition in circuit court on the basis that pursuant to certiorari procedure, the sole remedy available to Petitioner was under the Tennessee Teacher Tenure Act, specifically Tennessee Code Annotated section 49-5-513. The circuit court, although apparently persuaded by the school board's argument, was disinclined to grant dismissal. As an alternative, the court transferred the petition to chancery court for consolidation with Appellant's Petition for Judicial Review. After that transfer and for reasons undisclosed in this record, Ms. Windsor voluntarily dismissed her Petition for Judicial Review on March 21, 2002. On March 22, 2002, the trial court granted the DeKalb County Board's Motion to Dismiss the Petition for Writ of Certiorari. Petitioner then filed her Notice of Appeal on April 19, 2002, challenging the dismissal of the Petition for Writ of Certiorari.

Windsor, 2004 WL 875263, at * 1. Following a thorough analysis of the many issues presented in the first appeal, we reached the following conclusion:

> Aside from the fact that Appellant does not claim a right to a statutory writ of certiorari pursuant to Tennessee Code Annotated section 27-8-102, it is clear that no relief would be available for this type of certiorari in lieu of appeal, since not only does section 49-5-513 provide a remedy by review to the chancery court but, in fact, Appellant in this case did seek such a review by filing her petition in the chancery court on December 21, 2001. Appellant faces insurmountable impediments to a

meaningful review in this Court of the facts underlying her dismissal as a tenured teacher.

> 1. She has voluntarily dismissed her petition in the chancery court filed pursuant to Tennessee Code Annotated section 49-5-513.
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> 2. The only matter then left pending was her petition for a writ of common law certiorari filed in the circuit court and by that court, transferred to chancery court.
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> 3. No record of the proceedings before the DeKalb County School Board has been preserved for review.
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> 4. The right of review provided by Tennessee Code Annotated section 27-9-101 is not available because review is otherwise provided by section 49-5-513.
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> 5. The chancery court has properly dismissed Appellant's Application for Common Law Certiorari.

Windsor, 2004 WL 875263, at * 6. Based upon the foregoing, we held that the Chancellor's dismissal of the Petition for Writ of Certiorari was proper, and that the only remedy available to Ms. Windsor was the statutory Petition for Judicial Review, which she had voluntarily dismissed in 2001.

Subsequent to our 2004 ruling in *Windsor I*, Ms. Windsor filed suit in federal court against these and other defendants, wherein she asserted that the numerous defendants, including the Clerk and Master of the DeKalb County Chancery Court, had violated her civil rights, conspired against her to deprive her of her teaching position, violated the Tennessee Teacher Tenure Act, and violated the Tennessee Open Meetings Act. She sought declaratory and injunctive relief, as well as damages. All of the defendants filed motions to dismiss the action in federal court. After dismissing all of the federal claims asserted by Ms. Windsor, the U. S. District Court dismissed all the remaining claims set forth in the complaint on abstention grounds. Being dissatisfied with the ruling, Ms. Windsor appealed the adverse ruling to the U.S. Sixth Circuit Court of Appeals. The Sixth Circuit Court affirmed the District Court's dismissal, concluding she had not stated a claim upon which relief could be granted as to her conspiracy claims and also affirmed the dismissal based on abstention grounds. That order was entered on November 1, 2004.

Ms. Windsor then attempted to revive her state claims by filing the complaint at issue on June 17, 2005, which is titled Complaint and Petition for Writ of Certiorari. In the petition at issue, Ms. Windsor seeks nullification of the Board's November 21, 2001 dismissal of her as a tenured teacher. The defendants filed an answer to the petition, after which they filed a Motion for Summary Judgment. The Chancellor summarily dismissed the new complaint finding it was barred as untimely. The Chancellor also found that the three tolling theories upon which Ms. Windsor relied to contend the petition was timely filed did not apply. Specifically, the Chancellor found that equitable estoppel did not apply, that the savings statute did not apply, and that the School Board had

satisfied the statutory notice requirement set forth in Tenn. Code Ann. § 49-5-512(a)(9). This appeal followed.

ANALYSIS

The issues raised by Ms. Windsor in this appeal are whether the Chancellor erred by holding that the doctrine of equitable estoppel was not applicable, that the savings statutes did not apply against the defendants due to the fact they were governmental entities, and that the defendants satisfied the statutory notice requirements in Tenn. Code Ann. § 49-5-512(a)(9). We will discuss each in turn.

We find the Complaint and Petition for Writ of Certiorari, filed on June 17, 2005, is untimely because it was filed three and one-half years after Ms. Windsor received written notice of her termination. The Tennessee Teacher Tenure Act (TTA), Tenn. Code Ann. §§ 49-5-501 to -515 controls the matters at issue. It is undisputed that Ms. Windsor received proper notice of the charges being brought against her in September of 2001. What is disputed is whether the Board satisfied the statutory requirement under Tenn. Code Ann. § 49-5-512. The section, titled "Dismissal or suspension; hearing" provides, in pertinent part, that "a teacher, having received notice of charges pursuant to § 49-5-511, may, within thirty (30) days after receipt of notice, demand a hearing before the board, as follows:"

> (1) The teacher shall give written notice to the director of schools of the teacher's request for a hearing;
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> (2) The director of schools shall, within five (5) days after receipt of request, indicate the place of such hearing and set a convenient date, which date shall not be later than thirty (30) days following receipt of notice demanding a hearing;
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> (3) The teacher may appear at the hearing and plead the teacher's cause in person or by counsel;
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> (4) The teacher may present witnesses, and shall have full opportunity to present the teacher's contentions and to support them with evidence and argument. The teacher shall be allowed a full, complete, and impartial hearing before the board, including the right to have evidence deemed relevant by the teacher included in the record of the hearing, even if objected to by the person conducting the hearing;
> . . . .
>
> (7) A record of the hearing, either by transcript, recording, or as is otherwise agreed by the parties, shall be prepared, if the action of the board is appealed, and all actions of the board shall be reduced to writing and included in the record, together with all evidence otherwise submitted;
> . . . .

> (9) *The board shall within ten (10) days decide what disposition to make of the case and shall immediately thereafter give the teacher written notice of its findings and decision.*

Tenn. Code Ann. § 49-5-512(a).

Ms. Windsor admits receiving written notice of the Board's "decision" to dismiss her. She, however, contends that Tenn. Code Ann. § 49-5-512(a)(9) requires that the Board provide written notice of the Board's "findings and decision." Because the Board never provided written notice of its "findings and decision," she contends the statute of limitations never started running against her, thus it was "tolled." We, however, find that the tolling issue was rendered moot when Ms. Windsor timely filed the first of her petitions in 2001 to challenge the Board's decision to terminate her employment. By filing a petition, with or without having received written notice of the Board's findings, and thereafter voluntarily dismissing the petition, Ms. Windsor set into play the Tennessee Rules of Civil Procedure and the applicable savings statutes. Thus, any issues concerning the timeliness of Ms. Windsor's causes of action would be subject to Tenn. R. Civ. P. 41.01[1] and the savings statutes, Tenn. Code Ann. § 28-1-105. This is evident from the express language in the the savings statute, which provides that "[i]f the action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding the plaintiff's right of action, . . . the plaintiff . . . may, from time to time, commence a new action within one (1) year after the reversal or arrest." Tenn. Code Ann. § 28-1-105.

As for her reliance on the savings statutes, Ms. Windsor contends that two savings statutes, Tenn. Code Ann. §§ 28-1-105 and 28-1-115, save the day for her. We respectfully disagree. The general savings statute, Tenn. Code Ann. § 28-1-105, and the statute applicable to the dismissal of federal lawsuits for lack of subject matter jurisdiction, Tenn. Code Ann. § 28-1-115, do not apply against the DeKalb County Board of Education for the same reasons they did not apply against the municipalities in *Lynn v. City of Jackson*, 63 S.W.3d 332, 337 (Tenn. 2001) and *Nance v. City of Knoxville*, 883 S.W.2d 629 (Tenn. Ct. App. 1994). As the *Nance* court noted in an action brought pursuant to the Governmental Tort Liability Act, "it is well-settled that the general saving statute found in T.C.A. § 28-1-105 has no application to actions brought pursuant to the Governmental Tort Liability Act." *Id.* at 631 (citing *e.g. Rael v. Montgomery County*, 769 S.W.2d 211 (Tenn. Ct. App. 1988); *Williams v. Memphis Light, Gas & Water Div.*, 773 S.W.2d 522 (Tenn. Ct. App. 1988)). The

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[1]The 2006 Advisory Commission Comment to Rule 41.01 warns plaintiffs of pitfalls that may result from taking a voluntary nonsuit.

> Although Rule 41.01(2) allows two nonsuits without prejudice, a plaintiff must carefully consider the separate issue of whether the saving statute, T.C.A. § 28-1-105, authorizes a recommencement of the plaintiff's action after a nonsuit. A plaintiff should note that taking a second nonsuit, which is permitted by Rule 41.01(2), does not initiate a second one-year period for recommencing the action under the saving statute. *See Payne v. Matthews*, 633 S.W.2d 494, 495-96 (Tenn. Ct. App. 1982) (stating, "It has long been held that after the taking of any nonsuit to the original action, any additional suits would have to be filed within one year of the first nonsuit to be within the purview of T.C.A. Sec. 28-1-105.").

court went on to explain why the other savings statute, Tenn. Code Ann. § 28-1-115, also did not apply.

> T.C.A. § 28-1-105 and § 28-1-115 have a common purpose, i.e., to provide a plaintiff with an opportunity to renew a suit if a complaint is dismissed by any judgment or decree that does not conclude the right of action. *Turner v. Aldor Co. of Nashville, Inc.*, 827 S.W.2d 318 (Tenn. App. 1991). It would seem, therefore, to be incongruous in all respects to hold that one saving statute has no application to cases brought under the Governmental Tort Liability Act while the other does.
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> This conclusion is supported by *Williams v. Memphis Light, supra*, quoting *Automobile Sales Co. v. Johnson*, 174 Tenn. 38, 122 S.W.2d 453, wherein it is said:
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> > Where a statute creates a new liability or extends a new right to bring suit and that statute provides a time period within which to bring the action, that period "operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all." As thus defined, the right of action is conditional. The limitation inheres in the right itself.
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> > Since the Act [Governmental Tort Liability Act] created a new liability, it must be strictly construed. In so doing, we find that the twelve-month limitation period of T.C.A. § 29-20-305(b) for bringing an action is a condition precedent which must be met before a suit may be brought against a governmental entity.
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> *Williams v. Memphis Light, supra,* at page 523.
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> Applying the same reasoning to T.C.A. § 28-1-115, we hold that neither T.C.A. § 28-1-105 nor § 28-1-115 can be used to extend the period within which suit must be filed against a governmental entity. Since our resolution of the issues relating to the saving statutes is dispositive of the case, we find it unnecessary to address the question of laches.

Nance, 883 S.W.2d at 631-32 (quoting *Williams v. Memphis Light, Gas & Water Div.*, 773 S.W.2d 522, 523 (Tenn. Ct. App. 1988)).

The Tennessee Tenured Teacher Act, which is at issue here, like the GTLA, creates a right of action that did not otherwise exist. As the *Williams* court explained, "[w]here a statute creates . . . a new right to bring suit and that statute provides a time period within which to bring the action, that period 'operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all.'" *Williams*, 773 S.W.2d at 523 (quoting *Automobile Sales Co.*, 122 S.W.2d 453). Accordingly, the right of action is conditional. *Id.* We therefore find the principles espoused in the foregoing GTLA cases are applicable in an action brought pursuant

to the Tennessee Tenured Teacher Act. Therefore, neither Tenn Code Ann. § 28-1-105 nor § 28-1-115 are available to extend the period within which Ms. Windsor's cause of action must be filed.

The remaining issue raised by Ms. Windsor is that the filing period was tolled due to estoppel. We, however, find no factual or legal basis upon which to sustain her estoppel theory. There is simply no evidence in the record to suggest that the Board did anything to induce Ms. Windsor to refrain from filing or refiling her petition. It is undisputed that Ms. Windsor voluntarily dismissed her Petition for Judicial Review, which was not only her first but her best chance to address the ills of which she complains. For reasons wholly unexplained by the record, she never revived that claim. Instead, she chose to pursue a common law writ of certiorari, which, as Judge Cain discussed in *Windsor I*, afforded a much more restrictive review of the matters pertaining to her 2001 termination and was not available since the Teacher Tenure Act set out the method for judicial review. *See Windsor*, 2004 WL 875263, at *6.

As we noted in *Windsor I*, the difficulties experienced by Ms. Windsor in this morass of litigation arises from her *pro se* decision to voluntarily dismiss her first and most promising cause of action, the Petition for Judicial Review. As a tenured teacher, she had an excellent remedy for judicial review under Tenn. Code Ann. § 49-5-513. Subsection (b) affords a tenured teacher a review of the board's decision, by which the Chancellor will, in an expedited fashion, hold a "hearing [that] shall be de novo and may be on deposition and interrogatories, or on oral testimony." Tenn. Code Ann. § 49-5-513(g). Unfortunately, she voluntarily abandoned her best claim and for reasons unexplained by the record failed to timely revive that claim.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the appellant, Ms. Windsor.

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FRANK G. CLEMENT, JR., JUDGE